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ABSTRACT

First Amendment students were unhappy to see Supreme Court Justice Potter Stewart retire because his voting record demonstrated a favorable attitude toward freedom of speech and press. His replacement, Sandra Day O'Connor, was predicted to be a conservative or moderate who probably would vote consistently with Stewart in other areas, but her predilections about freedom of expression were unknown. In 184 cases in her first term and a half, O'Connor tended to side with the conservative justices in both First Amendment and other cases. Her decisions and opinions articulate a view that the role of the Court is limited and that deference to the states and to the political branches of the federal government should be the norm. In 23 free speech and press cases, O'Connor tended to side with the majority and with conservative justices. Her assertions of the values in the First Amendment pale in comparison with those of Stewart and other justices. Previous justices have developed a better appreciation for the First Amendment over time, but O'Connor has not leaned in that direction and may have an especially difficult time in doing so because of her "first women justice" status. (Author/HTH)

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A FIRST LOOK AT SANDRA DAY O'CONNOR AND THE FIRST AMENDMENT

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ABSTRACT

A FIRST LOOK AT SANDRA DAY O'CONNOR
AND THE FIRST AMENDMENT

First Amendment students of the Supreme Court of the United States were unhappy to see Justice Potter Stewart retire from the Court because his voting record demonstrated a favorable attitude toward freedom of speech and press. His replacement, Sandra Day O'Connor, was predicted to be a conservative or moderate who probably would generally vote consistently with Stewart in other areas, but her predilictions about freedom of expression were unknown.

O'Connor, in 184 cases in her first term and a half, has lived up to her expectations generally and in freedom of expression cases. She has tended to side with the conservative justices in both First Amendment and other cases. Her decisions and opinions articulate a view that the role of the Court is limited and that deference to the states and to the political branches of the federal government should be the norm.

The author found, after examining 23 free speech and press cases, that O'Connor tended to side with the majority and with conservative justices. Her assertions of the values in the First Amendment have paled in comparison with those of Stewart and other justices. Previous justices have developed a better appreciation for the First Amendment over time, but O'Connor has not leaned in that direction and may have an especially difficult time in doing so because of her "First Woman" status at the Court.

A FIRST LOOK AT SANDRA DAY O'CONNOR AND THE FIRST AMENDMENT

The retirement in 1981 of Justice Potter Stewart and the subsequent appointment of Justice Sandra Day O'Connor caused much speculation about their impact on the policies of the Supreme Court of the United States. Stewart was generally regarded as one of virtually a majority of justices on the Supreme Court who was a "swing vote" between the liberal and conservative extremes.[1] His Republican background apparently inspired his instincts toward judicial "restraint," i.e., the tendency to perceive the role of the Court in a limited context.[2] He frequently found the liberal perspective more appealing, however, in cases that gave rise to claims for civil right and liberties. He especially will be remembered for his unusually favorable attitude toward those who complained their First Amendment rights were violated by the government.[3] Thus, for example, Supreme Court correspondent Lyle Denniston, a frequent commentator on First Amendment issues, lamented the loss of Stewart who he described as "one of the press' best friends."[4]

Sandra Day O'Connor, on the other hand, once successfully past the initial rhetoric surrounding her "first woman" status,[5] was posed as a generally unknown commodity during the nomination and confirmation process.[6] As unpredictable a voter as Stewart sometimes was, O'Connor was frequently perceived in the journalistic and legal

communities as a moderate voice with conservative tendencies whose ultimate legal philosophy only time would produce. Because her background was limited to four years as an assistant attorney general, five years as a state senator, five years as a state trial judge, and two years as a state appeals court judge in Arizona, she left few indicators of her predilictions toward major federal constitutional questions, for the resolution of which Supreme Court justices are appointed. Law Professor Charles D. Kelso, after comparing Stewart's achievements with O'Connor's sketchy record, tentitively concluded, however, that "her prescence on the Court will not change many of its decisions."[7]

The question more sensitive to those in the mass media, however, is what does she think about the First Amendment? Will freedom of speech and press be as well served by O'Connor as it was by Stewart? Midway through her second term on the Court, a preliminary analysis of her work in cases affecting freedom of speech and press would seem appropriate. This analysis is preliminary and somewhat unfair because O'Connor has been on the Court such a short time. Nevertheless, her voting pattern and stated views in free expression areas lead students of the Court in a fairly clear direction that is not necessarily favorable to those areas.

O'Connor's Voting Record

This analysis encompasses 184 cases in which the Court issued a full opinion, in which the issues were treated on

their merits, and in which O'Connor participated.[8] These cases were decided between October 19, 1981, and January 24, 1983 when this analysis was stopped.[9]

The Supreme Court, under the leadership of Chief Justice Warren Burger frequently has been described as a divided Court.[10] No singular judicial ideology seems to motivate the justices as a group and, frequently, cases are decided by close votes or at least split votes.[11] This occurs despite a tradition at the Court that suggests that unanimity is a value worth striving for.[12] During O'Connor's period at the Court, for example, only 60 of the 184 cases were decided unanimously while 28 cases were decided by just one vote.

Students of the Court do not disagree about membership of the more extreme wings of the Court. Justices William Brennan and Thurgood Marshall have consistently argued liberal principles in cases and are almost certain to disagree with Burger and Justice William Rehnquist who invariably point out the conservative view.[13] The other justices, Lewis Powell, Harry Blackmun, Byron White, and John Paul Stevens, have demonstrated conservative voting records, but any one or all of them have sided with the liberals in particular cases.[14]

For the purposes of determining whether and to what degree O'Connor has sided with one ideological wing or the other, her voting interagreement with the conservative

and liberal leaders will be briefly discussed. Discounting 60 unanimous cases that reveal no differences of opinion and 45 cases that involved only one dissent or split the Burger-Rehnquist or Marshall-Brennan dyads, O'Connor voted conservatively 70 times and liberally 9 times in the 79 remaining decisions. She clearly announced her general position.[15]

Of the 184 cases, O'Connor was involved in 28 cases that were decided by 5-4 votes or cases in which her vote made a plain difference. In 16 of these situations, she chose to join or write dissenting opinions. Of these 16 cases, she joined the liberal group only twice. In the other 12 cases, O'Connor voted with the 5-4 majority. In every case but one, the majority was made up of conservative justices.

Her favorite opinion author was Rehnquist, whose opinions she joined 25 times. Other justices' opinions she joined were: Powell (22), Burger (20), White (16), Blackmun (13), Marshall (12), Stevens (11), and Brennan (3).[16] O'Connor wrote 36 opinions during this period, including 15 majority opinions (three of which were unanimous), nine concurring opinions, nine dissenting opinions, and three opinions conurring in part and dissenting in part. These are not inequitible amounts, although possibly an unusually high number for one so early in his or her Supreme Court tenure.

The voting record of Justice Stewart, espcially in

his first few terms and his last few terms, was similar to O'Connor's voting record in her first term and a half. But quality is much different than quantity, and the voting, opinion-writing, and opinion-joining habits tell only part of the story. O'Connor has indicated in a law review article, in her confirmation testimony, and in several Court opinions her conservative orientation that attracted Reagan to her.

O'Connor's law review article, "Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge,"[17] sympathized with the Burger-Rehnquist brand of federalism that afforded the federal government, especially the Supreme Court, a modest role in public policy-making. O'Connor argued that the states were at least equal to the task and likely better situated to handle social problems inappropriately seized upon by Congress and the federal courts in recent decades.

In her testimony before Congress, O'Connor pointedly promised that she would defer to the state governments and to the political branches of the federal government in interpreting the law. She said:

> I would not expand or restrict a statute to reflect my own views of what public policy should be. The proper role of the judiciary is one of intepreting and applying the law, not making it.[18]

In her performance on the Court, O'Connor has generally delivered on her promises. O'Connor frequently has joined Rehnquist's opinions which have taken this conservative

approach for ten years. For example, when sections of the Public Utility Regulatory Policies Act of 1978[19] were challenged under the Tenth Amendment by Mississippi, the Court held that Congress legitimately exercised its commerce clause powers.[20] In dissent, O'Connor complained that the act's provisions

> conscript state utility commissions into the national bureaucratic army. This result is contrary to . . . [precedent], antiethical to the values of federalism, and inconsistent with our constitutional history.[21]

O'Connor wrote for Powell, Burger, and Rehnquist when she dissented in Taylor v. Alabama[22] in which the majority ruled inadmissible as evidence a confession obtained after an illegal arrest even though the suspect was given the Miranda warning three times. O'Connor patiently construed Fourth Amendment precedent and complained that the majority "misapprehends the facts of the present case."[23] She said:

> The petitioner was warned of his right to remain silent and to have a lawyer present, and there is no dispute that he understood those rights or that he waived them voluntarily and without coercion.[24]

O'Connor also felt strongly enough to write opinions, among others, protesting the majority's declaration of a state tax law as unconstitutional,[25] concurring with a decision to deport alien witnesses absent a showing that the lost testimony would be "material and favorable" to a criminal defendant,[26] and arguing that the Court wrongly held a state death penalty law unconstitutional because it "interferes with state criteria for assessing legal guilt."[27]

Stewart was more likely than O'Connor to have had more sensitivity to criminal rights and federal supremacy, but generally O'Connor's stands do not represent a significant departure from her predecessor's. Where the difference may rest is in the First Amendment area.

O'Connor and the First Amendment

O'Connor's prenomination attitudes toward freedom of speech and press issues, if she had any, are overall unascertainable. As an Arizona state senator, she supported bills to require open meetings for state agencies and to relax zoning laws affecting sites of "adult" bookstores.[28] On the state appeals court, O'Connor slapped a college governing board for deciding to dismiss eight staff members during an executive session that violated the state's open meeting law. In her opinion for the unanimous court, she said the board's action was invalid but that the dismissals could be sustained if they were announced at a public meeting. O'Connor held that a trial court should determine whether the board's public announcement of the dismissals might have satisfied that requirement. She did not question the board's good faith despite the suspiciously evasive means the board used in the matter.[29]

O'Connor, as any public official of her experience, undoubtably had a firm understanding of how the news media operate prior to her nomination, but she claimed she was

"overwhelmed" by media attention after her name was announced by the White House. "I felt somewhat like you might feel if you went swimming at the ocean," she said, "all of a sudden you were engulfed by a tidal wave, the strength of which you didn't anticipate."[30] Sensing the power of the press personally cannot but help color a justice's attitude toward the role for the institution in society and, consequently, how much freedom of expression the news media should enjoy.

In her first term and a half on the Court, O'Connor has encountered 17 free speech and press cases, four Freedom of Information Act cases, and two cable television cases.

Freedom of Speech and Press

The 17 free speech and press cases can be organized this way: two obscenity cases, one religious speech case, six political speech cases, two commercial speech cases, three union speech cases, one press access case, one censorship case, and one free assembly case.

One obscenity case was California v. Mitchell Brothers[31] in which the Supreme Court held that a city was not required to prove beyond a reasonable doubt that a movie theater's films were obscene before passing a zoning ordinance affecting the site of the movie theater.[32] Over the dissents of Brennan, Marshall, and Stevens, O'Connor joined the per curiam majority opinion which reasoned that a state was not required by the First and Fourteenth Amendments to reach that standard of proof in a state civil proceeding. O'Connor apparently

disagreed with Brennan, who felt that proof "beyond a reasonable doubt" was necessary "to suppress otherwise constitutionally protected material."[33]

The following term, the Court upheld the constitutionality of a New York criminal statute prohibiting the knowing promotion of sexual performances of children under 16. Ferber, a Manhattan book store owner, was convicted for promoting films depicting young boys masturbating, but the New York Court of Appeals reversed the conviction on the grounds the law violated the First Amendment. On certiorari, the U.S. Supreme Court reversed and remanded. White, writing for four justices, including O'Connor, said child pronography lacking serious literary, artistic, political, or scientific value and specifically proscribed by state law was not protected by the First Amendment. The Court was unanimous, but while the majority opinion was vague on the issue, O'Connor and Brennan wrote concurring opinions disagreeing on whether sexual depictions of children with serious literary, artistic, scientific, or medical value ("social value") were capable of regulation under the First Amendment.

O'Connor contended that New York was entitled to regulate sexual depictions of children even when the material may have social value. She argued:

> [A] 12-year-old child photographed while masturbating surely suffers the same psychological harm whether the community labels the photograph "edifying" or "tasteless." The audience's appreciation of the depiction is simply irrelevant to New York's asserted interest in protecting children from psychological, emotional, and mental harm.[34]

O'Connor admitted that the statute might cover clinical pictures in medical textbooks or "pictures of children engaged in rites widely approved by their cultures" that may appear in National Geographic. The reach of the New York statute's overbreadth, however, was not substantial enough to warrant a finding of its unconstitutionality.[35]

Brennan, joined by Marshall, conceded that a "tiny fraction" of socially valuable sexual depictions of children may fall within the overbreadth of the statute, but "it is inconceivable how a depiction of a child that is itself a serious contribution to the world of art or literature or science can be deemed 'material outside the protection of the First Amendment.'"[36]

In the area of obscenity, O'Connor demonstrated a knowledge of the law and asserted a conservative gloss for the much-maligned definitional approach to the problem. She did not show sympathy for adult theater proprieters and showed her willingness to overlook potentially overly broad state obscenity regulation. She took the trouble to underscore the Burger Court majority's reconceptualization of obscenity's "social value" test.[37]

O'Connor joined an 8-1 majority in a religious speech case in her first term.[38] The University of Missouri at Kansas City refused to provide facilities for a registered student religious group when the state university provided the facilities for all other groups. The student group

argued the policy violated the free exercise of religion and free speech clauses of the First Amendment, and the Supreme Court agreed, saying the school's exclusionary rule was unjustifiable, content-based discrimination unable to pass First Amendment muster. Without a compelling state interest, the university was forbidden from asserting a right to greater separation of church and state than that which existed in law. In dissent, White argued that the university adequately demonstrated a permissible state end by its policy. O'Connor, the liberals, and the conservatives obviously did not agree.

In recent years, the Supreme Court has shown more interest in reviewing cases affecting freedom of political speech than other First Amendment areas. During O'Connor's first term and a half, the Court selected six such cases, deciding almost all of them unanimously or near-unanimously.

In 1981, the Court struck down by an 8-1 vote a Berkeley, California, city ordinance that limited to $250 the contributions to committees formed to support or oppose ballot initiatives.[39] The Court ruled that the law abridged First Amendment rights of association and collective and individual rights of expression without advancing a significant governmental interest. O'Connor chose, however, to join Blackmun's concurring opinion rather than the majority opinion. Blackmun narrowed the question somewhat, but stated that the Berkeley ordinance had failed to pass a rigorous

"exacting scrutiny test" to overcome First Amendment illegitimacy. He and O'Connor said the ordinance could not accomplish the stated objectives of avoiding corruption in the electoral process or making public the sources of support for ballot measures.[40] White was the lone dissenter. He felt that infringement on First Amendment rights was negligible and that the law was well designed to ensure a diversity of voices in the political process.[41]

O'Connor wrote her only First Amendment majority opinion in Bread Political Action Committee v. FEC,[42] although the First Amendment was not as pertinent to the case as her interpretation of the Federal Election Campaign Act of 1971.[43] At issue was whether trade associations and political action committees were categories of plaintiffs entitled to invoke expedited constitutional challenges to the act's provisions. The Bread PAC sought to challenge the constitutionality of the act's fund solicitations limitations, but a U.S. District Court held that the act granted expedited consideration of its constitutionality only to the Federal Election Commission, the national committee of any political party, or any voter. The Court of Appeals reversed, but O'Connor writing for the unanimous Court ruled that the language of the act specifically did not provide expedited challenges for other classes of plaintiffs. Although the holding addressed a rather technical point, O'Connor demonstrated her unquestioning faith in statutory construction even in the face of a lack of

legislative history and arguments for why the law was written the way it was. She wrote:

> The obvious fact that Congress wanted a broad class of questions to be speedily resolved . . . scarcely implies that Congress intended the courts to augment Congress' enumeration of qualified plaintiffs. . . . [W]e cannot impute to Congress the intention to confer standing on the broadest class imaginable. We do not assume the maximum jurisdiction permitted by the Constitution, absent a clearer mandate from Congress than here expressed.[44]

The Court was also unanimous in interpreting the Campaign Act to be constitutional in FEC v. National Right to Work Committee.[45] The Committee challenged a provision of the act restricting political fund raising for certain purposes by a class of corporations.

The Court was also unanimous in invalidating a Kentucky law prohibiting candidates from promising benefits to voters in exchange for their votes as applied to a candidate who pledged to reduce salaries during his campaign.[46] O'Connor joined Brennan's majority opinion, which held that the law limited the candidate's right to free speech because it invalidated his election for an innocent rhetorical error. Brennan said:

> The chilling effect of such absolute accountability for factual misstatements in the course of political debate is incompatible with the atmosphere of free discussion contemplated by the First Amendment in the context of political campaigns.[47]

In Clements v. Fishing,[48] the Court split 6-3 in upholding portions of the Texas constitution prohibiting state officials from running for other offices. Several state

legislators challenged the Texas constitution on the grounds that it violated their First and Fourteenth Amendment rights to participate in political campaigns. O'Connor joined Rehnquist's majority opinion that held the Texas constitution was not as restrictive as laws forbidding civil servants from political participation, and Texas adequately demonstrated its interest in limiting the political campaigning. Marshall and Brennan dissented, expressing the view that the state constitution was not narrowly tailored enough to escape their First Amendment scrutiny and was not designed to accomplish Texas's asserted interests.[49]

Finally, in Brown v. Socialist Workers '74 Campaign Committee,[50] the Court ruled an Ohio campaign law unconstitutional because it required candidates for a historically harassed political party to report publicly every contribution and expenditure of campaign funds in violation of their First Amendment rights. Marshall wrote the majority opinion for six justices. O'Connor concurred and dissented, joined by Rehnquist and Stevens. She agreed that no compelling state interest was served by requiring revelation of names of contributors who might be subject to subsequent hostility for their political points of view. Expenditures, in contrast, were of interest to states and did not create particular danger to robust political speech because (1) most campaign fund recipients, for example, landlords or printers, usually are not associated by the public with the party and (2) other

recipients, for example, campaign workers who are reimbursed for travel, already have publicly announced their political preferences and reporting their names will not subject them to significant additional harassment than they arguably experience with the law in effect.

In the political speech area then, O'Connor has demonstrated a firm belief in the importance of healthy discussion for informed voting at the polls. She was careful, however, to leave as undisturbed as possible limitations on certain campaign practices when Congress or states have sought to control those practices and even when violation of First Amendment rights are alleged.

The Court has also been confronted with three free speech cases involving union activities. Two of the cases the Court decided unanimously. In the first case, a Longshoremen's union refused to unload cargo shipped from the Soviet Union to protest that country's takeover of Afghanistan, but the Supreme Court determined that the strike was an illegal secondary boycott and unprotected by the First Amendment.[51]

In the second case,[52] the Court ruled that the discharge of union business representatives by a newly elected local union president did not violate the agents' free expression rights protected by the Labor Management Reporting and Disclosure Act of 1959.[53] In both straightforward cases, O'Connor joined the Court opinion.

The third union case involved an unsuccessful union candidate's suit against the Steelworkers union, whose "outsider rule" was construed to prohibit the candidate from using nonmember financial contributions to pay litigation costs. The Supreme Court, divided 5-4, held that the union rule neither violated the "right to sue" nor the "free speech and assembly" provisions of the Labor Management Act.[54] The majority opinion, written by Marshall and joined by O'Connor, held that Congress intended that union activities be minimally influenced by outside interests. Four dissenters--White, Burger, Brennan, and Blackmun--argued that Congress intended full "union democracy," including use of outside campaign contributions for union electoral purposes.[55]

O'Connor did not write an opinion on freedom of expression for unions. But she seemed satisfied that congressional regulation of union activities was sufficient to the tasks Congress assigned itself.

O'Connor participated in two unanimous commercial speech cases, an area of freedom of expression in which the Burger Court has made considerable progress in the past decade. In one case, the Court upheld the right of an attorney to advertise his services; in the other, the Court upheld the right of a city to regulate the marketing of drug paraphernalia (including advertising). Powell wrote for the Court in the attorney advertising case, holding that a Missouri Supreme Court rule forbidding non-misleading attorney

advertising was unconstitutional.[56] Marshall wrote for the Court in the drug paraphernalia case, holding that the city ordinance was, as challenged, not unconstitutionally vague or overbroad and served a legitimate state interest.[57] Since no disagreement existed between the justices in these cases and since O'Connor did not write a separate opinion, a determination of her particular point of view on this new area of First Amendment theory will have to wait for subsequent litigation.

The Court reviewed one case involving the right of assembly. O'Connor and five others joined Stevens's majority opinion that held that a Mississippi state court could not, under the First Amendment, impose liability on participants in a black boycott of white businesses for losses other than those caused by the demonstraters' violence or threats.[58] Rehnquist concurred without writing an opinion,[59] and Marshall did not participate in the case.[60]

In a school censorship case, a highly divided Court remanded on First Amendment grounds a U.S. District Court's summary judgment in favor of a school board that had ordered certain books be removed from library shelves. Brennan, announcing the Court opinion only for himself, Marshall, and Stevens, ruled that summary judgment by the lower court was inappropriate because First Amendment rights of student library patrons required inquiry into the board's justification.[61] Blackmun and White each wrote concurring opinions and Burger, Powell, Rehnquist, and O'Connor each wrote dissenting opinions.

O'Connor also joined Burger's dissenting opinion, which rejected the plurality's notion that elected school boards' decisions about educational materials were subject to federal court review.[62]

In her opinion, O'Connor reiterated Burger's position and added that "so long as [a school board] . . . does not also interfere with the rights of students to read the material and to discuss it," the board can choose to remove books from a school library as readily as it purchases such books. She said:

> I do not personally agree with the board's action with respect to some of the books in question here, but it is not the function of the courts to make the decisions that have been properly relegated to the elected members of school boards.[63]

O'Connor, in the situation of school book banning, apparently would defer to majority views as to the appropriateness of materials available in schools for students. She cautioned that categorically forbidding the reading of the books obtained elsewhere would be, at least for her, another question.

In the last First Amendment case, O'Connor wrote a concurring opinion in Globe Newspaper Co. v. Superior Court[64] which emphasized the press's right of access to criminal trials. A Massachusetts statute mandating exclusion of the press and public in sex offender trials when minor victims

testify was deemed offensive to the First Amendment by the Court. Brennan, writing for a five-member majority, said a strict exclusionary rule covering every contingency was overbroad and constitutionally faulty. He said a compelling state interest could provide trial judge discretion in excluding the public but not in all circumstances. Burger, Rehnquist, and Stevens dissented, contending that protection against psychological harm to minor sex offense victims was compelling enough a state interest to warrant blanket exclusion of the public.

Students of press law hoped Globe Newspaper and the precedent on which it was based, Richmond Newspapers, Inc. v. Virginia,[65] would be percursors of First Amendment rights of access to governmental and other places of newsworthiness. Brennan's Globe majority opinion hinted at this.[66] But in her concurring opinion in Globe, O'Connor wrote:

> Richmond Newspapers rests upon our long history of open criminal trials and the special value, for both public and accused, of that openness [not so much the First Amendment]. . . . I interpret neither Richmond Newspapers nor the Court's decision today to carry any implications outside the context of criminal trials.[67]

O'Connor was apparently not ready to expand the right of the press and the public to witness first hand other matters of public importance. This is a matter of great moment for the modern press, however, and O'Connor is bound to be asked the question several more times.

Freedom of Information

Although not First Amendment-based, O'Connor's interpretations of the Freedom of Information Act of 1967[68] is of interest to the news media and to those interested in government openness and accountability. In O'Connor's first term and a half, the Court accepted four cases for review.

In Weinberger v. atholic Action of Hawaii, the Court unanimously ruled that the National Environmental Policy Act of 1969[69] did not require the U.S. Navy to prepare and release an environmental impact statement regarding nuclear weapons storage. Writing for O'Connor and five other justices, Rehnquist held that the Act's public disclosure provisions were governed by the FOI Act, which protected release of military secrets.

In Baldridge v. Shapiro,[70] the Court again was unanimous in upholding a refusal by the Bureau of Census to disclose address lists protected by exemption in the FOI Act. Burger, writing for all nine justices, said that the Census Act of 1976[71] specifically prohibited the release of the information and provided cause for exemption from disclosure under the FOI Act.

In Department of State v. Washington Post Co.,[72] the Court yet again was unanimous in sustaining the State Department's refusal under the FOI Act's invasion of privacy exemption to reveal citizenship information on foreign nationals

to the Washington Post. Rehnquist wrote for all of the justices, except O'Connor, who concurred in the judgment only and wrote no separate opinion.[73]

The fourth FOI Act case lacked the unanimity the others garnered for the Court, which split 5-4 in FBI v. Abramson.[74] White wrote the majority opinion for Burger, Powell, Rehnquist, and Stevens, ruling that the law enforcement exemption of the Freedom of Information Act exempted information contained in law enforcement records but also incorporated into documents not compiled for law enforcement purposes. Brennan joined Blackmun in one dissent and Marshall joined O'Connor in another dissent.

After favorably quoting Justice Felix Frankfurter's well-known strict constructionist's philosophy,[75] O'Connor describes as "absurd" the notion that records not compiled for law enforcement purposes could be exempted from public disclosure under the law enforcement exemption of the FOI Act.[76] She continued:

> To reach its result, the Court assumes that, through inadvertence or inattention, Congress' pen slipped while amending Exemption 7 in 1974. . . . It is not the function of this Court, however, to apply finishing touches needed to perfect legislation. . . . Absent compelling evidence to the contrary, the best indication of Congress' intent is Congress' own language.[77]

O'Connor's interpretation of the FOI Act certainly has not been on the basis of her views on the desired extent of the openness or accountability of government. She has been

more concerned with properly construing congressional intent, an area in which she had no problem with other justices in three of the four cases.

Cable Television

Last, the Supreme Court addressed two cases affecting cable television that may be of interest to the mass media, although in neither case did O'Connor write an opinion.

In Loretto v. Teleprompter Manhattan CATV Corp.[78] O'Connor joined a six-justice majority opinion written by Marshall who ruled that a New York law requiring landlords to allow cable television facilities on their property constituted the "taking" of property compensable under the Fifth and Fourteenth Amendments. Brennan and White joined Blackmun's dissenting opinion which argued that a temporary physical invasion, such as a cable television hookup, did not constitute a "taking" within the meaning of the Fifth Amendment.[79]

In Community Communications Co. v. Boulder,[80] the Court held that a city ordinance prohibiting a cable television operator from expanding its service into another area of the city was not "state action" and therefore was not exempted from federal anti-trust laws. The cable operator successfully used a First Amendment argument in lower courts, but the Supreme Court did not consider implications for freedom of expression in its decision. Brennan wrote the majority opinion for Marshall, Blackmun, Powell, and Stevens. O'Connor and

Burger joined Rehnquist's dissenting opinion which said that Congress did not intend that the Sherman Act[81] would preempt the police powers of states.[82]

O'Connor, by joining Rehnquist's opinion in Boulder, clearly indicated she felt asserted local regulation of cable television and other industries was preferable to federal oversight, but in Loretto she was willing to say that that local regulation could go too far, if not in the name of free enterprise, then in the name of individual property rights.

Discussion

Media attorney Floyd Abrams described the retirement of Justice Potter Stewart as "a great loss" to freedom of the press because Stewart had an "expansive view of the rights of the press to publish and be free of governmental intrusion."[83] Stewart's replacement, Justice Sandra Day O'Connor, was predicted to be generally in agreement with many of Stewart's political views and his judicial philosophy,[84] even though her attitudes toward First Amendment issues were unknown and unknowable.

Since joining the Court, O'Connor has produced a pattern of votes and opinions that suggest she has been true to the predictions of her generally conservative orientation, of her restraintist approach to Court policy-making, and of her agreement with Stewart's views. She much more frequently

agrees with Chief Justice Warren Burger and Justice William Rehnquist than with Justices William Brennan and Thurgood Marshall.

Unlike Stewart, however, O'Connor has demonstrated no particular affinity for libertarianism in First Amendment areas. She seemed just as likely to practice conservatism or moderation in judicial ideology in free expression cases as she did in other cases. In short, her addition possibly may represent a significant difference in the Court in First Amendment matters.

First Amendment advocates can no longer count on the favorable attitude Stewart articulated on the Court. Instead, they should learn to convince O'Connor on a case-by-case basis that freedom of expression is a value that principled justices have forcefully argued amid the sometimes uncomfortably heated atmosphere of majoritarian sentiment to the contrary.

The number and kinds of First Amendment cases in which O'Connor has participated thus far may or may not be representative of future issues in what should be a long career on the Court. (She is only 52 years old.) Many justices have spent their initial years on the Court before fully appreciating the magnitude of life tenure and the profundity of constitutional enuciation and explication.

This potential development in O'Connor can only be all the more difficult because of her "First Woman" status. As

Margaret Hennig, dean of the Graduate School of Business Management at Simmons College (and who has studied first women in business), put it to columnist Ellen Goodman:

> She will be walking into a male world, and she'll have to establish herself. Most women who successfully join a male task force try to establish themselves at the level of technical competence. And while they do that, they begin to build one-to-one relationships so that when they are in group settings, they have some allegiances. That's real hard when you are on the Supreme Court and have to perform right away.[85]

O'Connor's development in the area of freedom of expression may be in the direction of Stewart or in the direction of Rehnquist. Unfortunately, she appears to be leaning in Rehnquist's direction.

ENDNOTES

[1]See, e.g., David W. Rohde and Harold J. Spaeth, Supreme Court Decision Making (San Francisco: Freeman, 1976), pp. 143-148.

[2]See, e.g., Richard Hodder-Williams, The Politics of the US Supreme Court (London: Allen & Unwin, 1981).

[3]See, e.g., George E. Padgett, "The Voting Record of Justice Stewart on First Amendment Cases," Journalism Quarterly 59 (Winter 1982):554-559; Potter Stewart, "'Or of the Press'," Hastings Law Journal 26 (January 1975):631-637. Also see, e.g., Branzburg v. Hayes, 33 L.Ed.2d 626, 665-682 (Stewart, J., dissenting); Herbert v. Lando, 60 L.Ed.2d 115, 148-150 (Stewart, J., dissenting); Monitor Patriot Co. v. Roy, 28 L.Ed.2d 35 (1971); Time, Inc. v. Pape, 28 L.Ed.2d 40 (1971); Ocala Star-Banner Co. v. Damron, 28 L.Ed.2d 57 (1971).

[4]Lyle Denniston, "Sandra O'Connor to be Tested Early and Often," Quill 69 (October 1981):15.

[5]See generally, Beverly B. Cook, "Women as Supreme Court Candidates: From Florence Allen to Sandra O'Connor," Judicature 65 (December-January 1981-1982):314-326, and Susan Mann amd Dan Fiduccia, "Sandra Day O'Connor: The Making of a Precedent," Stanford Lawyer 16 (Fall-Winter 1981):4-9.

[6]See, e.g., "Easy Senate Confirmation Expected for O'Connor," Associated Press story distributed about 8 July 1981; Drummond Ayers Jr., "She Just Might Su prise Some People," New York Times News Service story distributed about 9 July 1981; Stuart Taylor Jr., "Sandra O'Connor: Conservative and Fair," New York Times News Service story distributed about 8 July 1981; "Senate Panel Approves O'Connor," Associated Press story distributed about 15 September 1981; "Burger Calls O'Connor 'Splendid' Court Nominee," Associated Press story distributed about 19 August 1981; Fred Barbock, "New Justice is Low-Keyed, Relatively," Washington Post, 26 September 1981, p. A2; Linda Greenhouse, "Senate Confirms Judge O'Connor; She Will Join High Court Friday," New York Times, 22 September 1981, pp. 1, 14; "Hearings Don't Offer Many Clues to O'Connor's Judicial Viewpoint," Associated Press story distributed about 13 September 1981; "O'Connor Puts Herself in Conservative Niche," Knight-Ridder News Service story distributed about 11 September 1981; Rob Elder, "Totality of the Jurist Bears on Court Tasks," Knight-Ridder News Service column distributed about 24 September 1981; Gaylord Shaw and Bob Secter, "Judge O'Connor Viewed as Tough, Fair, Flexible," Los Angeles Times, 12 July 1981, pp. 1, 28, 30, 31.

[7]Charles D. Kelso, "Justice O'Connor Replaces Justice Stewart: What Effect on Constitutional Cases," Pacific Law Journal 13 (1982):270-271.

[8]O'Connor has made something of a splash by not only declining to participate in cases that were presented to the Court prior to her confirmation--which is normal--but also by "recusing" herself in an unusually high number of other cases. The justices are not required to provide reasons for refusing to participate in cases, but Denniston reported that a combination of factors, including her extensive financial interests and her lawyer-husband's varied law practice, have presented potential appearances of conflict of interests. Lyle Denniston, "O'Connor is Ducking Some Cases," Baltimore Sun News Service story distributed about 22 November 1981. O'Connor has also joined Rehnquist in two dissenting opinions in denials of petitions for writs of certiorari. Haver v. United States, 71 L.Ed.2d 680 (1982), and Israel v. McMorris, 71 L.Ed.2d 684 (1982). She also wrote an opinion, joined by Rehnquist, dissenting from a denial of certiorari. Mach v. Oklahoma, 74 L.Ed.2d 161-162. She has written no opinions from chambers in her capacity as 6th Circuit justice.

[9]For consistency of citation and because the cases are new, United States Supreme Court Reports, Lawyer's Edition, will be used throughout the paper rather than the official United States Reports.

[10]See, e.g., Stephen L. Wasby, Continuity and Change: From the Warren Court to the Burger Court (Pacific Palasades, Calif.: Goodyear, 1976).

[11]Rohde and Spaeth, Supreme Court Decision Making.

[12]Walter Murphy, Elements of Judicial Strategy (Chicago: University of Chicago Press, 1964).

[13]Rohde and Spaeth, Supreme Court Decision Making.

[14]Ibid.

[15]Also see Linda Greenhouse, "Justice O'Connor is Mostly With the Majority," New York Times story reprinted in Los Angeles Daily Journal, 1 February 1982, p. 3.

[16]These figures are somewhat influenced by the sheer number of majority opinions conservatives enjoy writing because they generally make up the majority. Burger assigns the vast majority of opinions as chief justice when he is in the majority. The senior associate justice the majority

opinion when he or she is in the majority and Burger dissents. Thomas A. Schwartz, "Warren E. Burger: Editor-in-Chief Justice of the United States?" paper presented to the Association for Education in Journalism and Mass Communication, Athens, Ohio, 1982. The numbers do not total 184 because O'Connor was free in any case to vote without writing or joining an opinion or to join several opinions.

[17]Sandra Day O'Connor, "Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge," William and Mary Law Review 22 (1981):801.

[18]Quoted in Elder, "Totality of the Jurist Bears on Court Tasks."

[19]15 USCS §§3201 et seq.; 16 USCS §§824a-3, 2611 et seq.

[20]FERC v. Mississippi, 72 L.Ed.2d 532 (1982).

[21]Id. at 557 (O'Connor, J., dissenting).

[22]73 L.Ed.2d 314 (1982).

[23]Id. at 323 (O'Connor, J., dissenting).

[24]Id. at 326.

[25]F.W. Woolworth Co. v. New Mexico, 73 L.Ed.2d 819, 833 (1982).

[26]United States v. Valenzuela-Bernal, 73 L.Ed.2d 1193, 1207 (1982) (O'Connor, J., concurring).

[27]Enmund v. Florida, 73 L.Ed.2d 1140, 1154 (1982) (O'Connor, J., concurring).

[28]Denniston, "Sandra O'Connor to be Tested," p. 15.

[29]Cooper v. Arizona Western College District Governing Board, 125 Ariz. 463, 610 P.2d 465 (Ct. App. Div. 1, 1980).

[30]Quoted in "O'Connor Overwhelmed by Attention," Associated Press story distributed about 22 September 1981.

[31]70 L.Ed.2d 262 (1981).

[32]Id. at 265-267.

[33]Id. at 267.

[34]New York v. Ferber, 73 L.Ed.2d 1113, 1134 (1982) (O'Connor, J., concurring).

[35]Id. at 1135.

[36]Id. (Brennan, J., concurring), citing majority opinion. Id. at 1126-1127.

[37]See Miller v. California, 37 L.Ed.2d 419 (1973) and Paris Adult Theatre I v. Slaton, 37 L.Ed.2d 446 (1973).

[38]Widmar v. Vincent, 70 L.Ed.2d 440 (1981).

[39]Citizens Against Rent Control v. Berkeley, 70 L.Ed.2d 492 (1981).

[40]Id. at 502-503 (Blackmun, J., concurring).

[41]Id. at 503-508 (White, J., dissenting).

[42]71 L.Ed.2d 432 (1982).

[43]12 USCS §§4371.

[44]71 L.Ed.2d 438-439.

[45]74 L.Ed.2d 364 (1982).

[46]Brown v. Hartlage, 71 L.Ed.2d 732 (1982).

[47]Id. at 746.

[48]73 L.Ed.2d 508 (1982).

[49]Id. at 524.

[50]74 L.Ed.2d 750 (1982).

[51]Longshoremen v. Allied International, Inc., 72 L.Ed.2d 21 (1982).

[52]Finnegan v. Leu, 72 L.Ed.2d 239 (1982).

[53]29 USCS §§401, et seq.

[54]United Steelworkers of America v. Saldlowski, 72 L.Ed.2d 707 (1982).

[55]Id. at 722 (White, J., dissenting).

[56]In the Matter of R.M.J., 71 L.Ed.2d 64 (1982).

[57]Hoffman Estates v. Flipside, Hoffman Estates, Inc., 71 L.Ed.2d 362 (1982).

[58]NAACP v. Claiborne Hardware Co., 73 L.Ed.2d 1215 (1982).

[59]Id. at 1250 (Rehnquist, J., concurring).

[60]Id.

[61]Board of Education v. Pico, 73 L.Ed.2d 435 (198?).

[62]Id. at 458 (Burger, C.J., dissenting).

[63]Id. at 481.

[64]73 L.Ed.2d 248 (1982).

[65]65 L.Ed.2d 973 (1980).

[66]73 L.Ed.2d 255-256.

[67]Id. at 260 (O'Connor, J., concurring).

[68]5 USCS §552.

[69]70 L.Ed.2d 298 (1981). The act is 42 USCS §4332(2)(c).

[70]71 L.Ed.2d 199 (1982).

[71]13 USCS §§8(b) and 9(a)1.

[72]72 L.Ed.2d 358 (1982).

[73]Id. at 365 (O'Connor, J., concurring).

[74]72 L.Ed.2d 376 (1982).

[75]Id. at 390-391 (O'Connor, J., dissenting).

[76]Id. at 391 (O'Connor, J., dissenting).

[77]Id. at 396-397.

[78]73 L.Ed.2d 868 (1972).

[79]Id. at 886 (Blackmun, J., dissenting).

[80]70 L.Ed.2d 810 (1982).

[81]15 USCS §1.

[82]70 L.Ed.2d 824-832 (Rehnquist, J., dissenting).

[83]Quoted in Stuart Taylor, "Because Ideology is More Important," New York Times News Service story distributed about 30 June 1981.

[84]See, e.g., Carl R. Schenker, Jr., "'Reading' Justice Sandra Day O'Connor," Catholic University Law Review 31 (Spring 1982):487-503.

[85]Ellen Goodman, "Justice First," Washington Post, 30 September 1981, p. A27.